

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

EVAN AMBER OVERTON and	.	Civil Action No. 1:19cv751
JOHN KEENAN OVERTON,	.	
Co-Administrators for the	.	
Estate of Ezra Michael	.	
Overton,	.	
	.	
Plaintiffs,	.	
	.	
vs.	.	Alexandria, Virginia
	.	December 13, 2019
FISHER-PRICE, INC., and	.	10:11 a.m.
MATTEL, INC.,	.	
	.	
Defendants.	.	
	.	
.	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE THERESA CARROLL BUCHANAN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	MICHAEL G. PHELAN, ESQ. Phelan Petty, PLC 6641 West Broad Street, Suite 406 Richmond, VA 23230 and JAN V. HINSON, ESQ. Law Offices of Jan V. Hinson, P.C. 11175 Cicero Drive, Suite 100 Alpharetta, GA 30022
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(APPEARANCES CONT'D. ON PAGE 2)

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(Proceedings recorded by electronic sound recording, transcript
produced by computerized transcription.)

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P R O C E E D I N G S

THE CLERK: Overton, et al., versus Fisher-Price, Inc., et al., Case 19cv751. Counsel, please note your appearances for the record.

MR. PHELAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. PHELAN: I'm Michael Phelan for the plaintiff, and this is my cocounsel, Jan Hinson.

THE COURT: Good morning.

MS. HINSON: Good morning, Your Honor.

MR. FOWLER: Good morning, Your Honor.

THE COURT: Good morning.

MR. FOWLER: Stephen Fowler on behalf of Mattel, Inc., and Fisher-Price, Inc.

THE COURT: All right.

MR. FOWLER: And with me is Lori Cohen.

THE COURT: Good morning.

MS. COHEN: Good morning, Your Honor.

THE COURT: All right, this is on the plaintiffs' motion to compel. Do you have anything to add to your motion? I've read all the pleadings.

MR. PHELAN: I do. We've had some discussions, and I think some clarification may help the Court.

THE COURT: Okay. Good.

MR. PHELAN: If I could, I'd like to hand up some

1 documents that help illustrate the point and the dispute, but I
2 would also like to point out that when we filed the motion, we
3 had not yet disclosed designated experts and have been able to
4 do so since, so we are going to withdraw the request for an
5 extension of the discovery deadline --

6 THE COURT: Okay. Good.

7 MR. PHELAN: -- and strictly focus on some specific
8 discovery responses.

9 THE COURT: Okay.

10 MR. PHELAN: And if I may, with the Court's
11 permission, just hand up some documents that I think help
12 illustrate the dispute?

13 THE COURT: I did have one question. Did you -- did
14 the discovery responses not have any reference to Bate
15 numbers -- Bates numbers?

16 MR. PHELAN: They had broad-range references, you
17 know, from this page to this page, thousands of pages.

18 THE COURT: Okay.

19 MR. PHELAN: But, but what was produced were, you
20 know, you open up the link and it's hundreds of PDFs,
21 uncategorized, unlabeled, that have to be opened and read to
22 even know what the documents are.

23 THE COURT: Okay.

24 MR. PHELAN: And they're not -- they were not batched
25 together, you know, in, in a fashion that --

1 THE COURT: Was it a combination of documents within
2 there?

3 MR. PHELAN: Yes.

4 THE COURT: For instance -- okay.

5 MR. PHELAN: Yes.

6 THE COURT: All right.

7 MR. PHELAN: Yes.

8 So, Your Honor, the -- what I handed up is, the first
9 two photographs sort of explain the theme of the case, and so
10 this, this rocker that I know you're familiar with because
11 you've read everything --

12 THE COURT: I've read about the child being able to
13 stand.

14 MR. PHELAN: Yeah.

15 THE COURT: Is that what the first photo is?

16 MR. PHELAN: Yes. So this is -- this shows a child
17 standing while buckled.

18 THE COURT: Right.

19 MR. PHELAN: And you can see there's no shoulder
20 strap, and, and infants have this primitive reflex where if you
21 push on the bottom of their feet, they're going to push up even
22 if they're not old enough to stand, and so that's what we
23 allege happened in this case.

24 And that -- and the next photograph is actually a
25 still photo of a video experiment conducted by the defendants

1 in another case in which this child just stood up during,
2 during the experiment, and that child is buckled as well.

3 And the reason that's relevant is because in their
4 30(b)(6) depositions in another case, the defendants deny that
5 it's possible for a child to even roll over, let alone stand
6 up, while restrained. And indeed, their recall notice kind of
7 blames the parents, saying that these -- we're recalling this
8 because of fatalities that occur when, when children roll over
9 while unrestrained and, and under other circumstances. That's,
10 that's how they recalled this product.

11 And so if they're going to claim that it's impossible
12 for a restrained child to stand up or roll over, then we think
13 it's discoverable whether they have information that this was
14 going on and did they test about it, etc., and did they have
15 notice about it when -- even after the date of our incidents,
16 because if they're going to say it's impossible, then evidence
17 that it happened, regardless of when, is at least discoverable
18 and arguably admissible. So that's the foundation, I think,
19 for our argument.

20 And I would like to turn my attention to the joint
21 discovery plan because there was a lot of conversation about
22 that in the opposition, and before I do that, I'll say that the
23 defendants in other cases, if you look at the next set of
24 documents, there's a letter on Nelson Mullins letterhead, so in
25 other cases, they've conceded that there's many, many, many

1 models of this Rock 'n Play Sleeper, but --

2 THE COURT: But as I understand it, they hardly had
3 any changes.

4 MR. PHELAN: That's right. It's just a difference in
5 appearance of the cloth insert. You know, some of them had
6 monkey faces, some had lamb faces, some had no, no animal theme
7 whatsoever, but the relevant design, as is stated in this
8 letter, hasn't changed since 2009. Remained the same since its
9 first production in 2009.

10 The reason I bring that up, and they actually in the
11 next document, they put that into a sworn discovery response,
12 is because one of the major meet-and-confer issues that we had
13 to spend a lot of time on in this case was the defendants
14 wanted to define the Rock 'n Play as just the SnugaMonkey model
15 because that's what our child died in, and initially they, they
16 were going to only produce, you know, or only produce without
17 objection documents about the SnugaMonkey, and we had to talk
18 about that, you know, at length and wait and wait and wait on
19 their consideration of that, and, you know, it's just -- it
20 just delayed, delayed, delayed.

21 You can see from the -- I'm not going to belabor the
22 point, but the photographs that follow are the SnugaMonkey and
23 every other model, and you can see that there -- there's no
24 difference other than the insert, fabric insert.

25 So, you know, we took a lot of criticism, I think, in

1 the opposition about this joint proposed discovery plan, and
2 what was not mentioned in that opposition is paragraph 4 of the
3 joint -- well, let me back up.

4 I think the -- I think if the Court only read the
5 opposition, the Court would be under the impression that all
6 the defendants were required to do was reproduce documents from
7 these two other cases, *Goodrich* and *Torres*, which they claim
8 Ms. Hinson already had, as if we would agree that that was our
9 discovery plan, you just gave us what we already have. That's
10 how the opposition reads.

11 And the, and the -- it's interesting to note that the
12 *Goodrich* incident happened July 24, 2014, and the *Torres*
13 incident happened October 19, 2013. So we -- obviously,
14 there's a whole bunch of relevant information that extends
15 beyond *Goodrich* and *Torres*, and the discovery plan says that
16 and notes that. And indeed, in paragraph 4 of the discovery
17 plan, it says the parties will conduct discovery on the
18 subjects raised in the pleadings.

19 Well, our complaint was very, very extensive. It
20 talked all about other incidents, giving notice. It talked
21 about the recall, and it talked about how there was absolutely
22 no clinical testing done by defendants before they released
23 this product onto the market, and went into the detail about
24 the one doctor that they, they even consulted, who was not a
25 pediatrician and has since lost his medical license.

1 The, the, the joint discovery plan contemplates
2 interrogatories. It, it, it talks about requests for
3 production being done pursuant to Rule 34, and then in addition
4 to -- it says specifically in paragraph 6: In addition to the
5 *Goodrich* and *Torres* production, the plaintiffs can request
6 updated production which will be discussed in good faith, and
7 it contemplates what I discussed earlier. There are going to
8 be -- there are going to be responses to our requests that
9 couldn't have been covered by *Goodrich* and *Torres*, and, and
10 this discovery plan, which was dated 9/25/19, specifically
11 says, quote, such as requests for documents concerning the
12 recall.

13 So we were talking about getting documents concerning
14 the recall and getting other incident documents back in
15 September, and, you know, I had to send a letter on November 20
16 to say: What's going on here?

17 And the response -- because, you know, in the letter,
18 I say: We agreed you'd produce these things.

19 And the response was: No, we agreed to consider it.

20 So between that and this global objection that only
21 the model, the SnugaMonkey model is relevant, you know, that's,
22 that's, that's the reason for, in my opinion, the delay.

23 So here's what we seek specifically today. And we've
24 tried to narrowly tailor this.

25 THE COURT: Okay.

1 MR. PHELAN: And after I outline the categories, I'll
2 get to the specific requests. Other incident information, and
3 I'm going to talk about pre-Ezra Overton's incident, which was
4 December 22, 2017, and post. Pre, in discussions with counsel,
5 we believe they produced all fatalities. I think they should
6 also produce nonfatal incidents involving near asphyxiation or
7 suffocation.

8 There are a lot of incidents out there where there is
9 a mold problem in this product, and, you know, we don't need to
10 see the mold documents, but if a child was in the chair and was
11 suffocating or asphyxiating, turning blue, and the mom got her
12 just in time, that's still relevant.

13 THE COURT: Okay.

14 MR. PHELAN: And counsel indicates they think that
15 they actually have produced that, even though their responses
16 say they're limiting it to fatalities, and if that's the case,
17 they just need to say so.

18 THE COURT: Okay.

19 MR. PHELAN: I just want -- I want the answer to be
20 clear what we have and what they're agreeing to produce.

21 Post-Ezra Overton incidents, I think I've already
22 explained why I think they're relevant, because their 30(b)(6)
23 expert testified under oath that if it's -- if the child's
24 restrained, it's not possible for the child to stand in the
25 chair, and --

1 THE COURT: Well, now you talked about that in
2 connection with the testing, but why would other incidents
3 post-Overton --

4 MR. PHELAN: Well, because if another child was found
5 standing and restrained in the chair --

6 THE COURT: Okay.

7 MR. PHELAN: -- and it was -- and it's in the form of
8 an incident report even from the CPSC or internal --

9 THE COURT: Okay.

10 MR. PHELAN: -- then it proves that it's possible.

11 THE COURT: All right.

12 MR. PHELAN: Okay? So that's the first category.

13 The second category is the recall information.

14 THE COURT: Right.

15 MR. PHELAN: And what we got was basically anything
16 you could get publicly plus a form letter that they sent to all
17 the retailers, and those pictures of each model that I've
18 showed you are actually safety alerts that were put on the
19 internet.

20 What we don't have and what we're asking for are
21 communications between defendants and CPSC leading up to there
22 was a safety alert the week before the recall and then there
23 was the recall, and we want those documents.

24 And again, as reflected in the joint discovery plan,
25 it was contemplated that we wanted those documents early on,

1 and what I'm hearing is, well, that would require an ESI search
2 to separate out the CPSC communications involving this product
3 as opposed to other products, etc., and, you know, I hear that,
4 but my -- I think my -- I think my reaction is that search
5 should have been conducted at least the day after the joint
6 discovery plan was entered into, because it's contemplated in
7 the discovery plan, but probably sooner. So, so that's the
8 recall information.

9 THE COURT: Okay.

10 MR. PHELAN: I would point out that whether it's
11 discoverable is different than whether it's admissible --

12 THE COURT: Right.

13 MR. PHELAN: -- and there's all kinds of things the
14 CPSC invites the manufacturer to produce to them in response to
15 a, hey, we're going to put out this safety alert or recall
16 notice in 24 hours; send us what you want.

17 We want to know what they sent them.

18 THE COURT: Okay.

19 MR. PHELAN: And maybe it's nothing, but that should
20 be the answer, okay?

21 And then finally, the third topic is this -- the
22 product was, you know, the quote on the packaging of this
23 product was "designed for all-night sleep." It was the first
24 product on the market that was designed for all-night sleep,
25 where the child was going to sleep at a 30 or greater degree

1 incline angle, and the only thing talking about safe sleep in
2 the '90s, when this came out, was the AAP and other health
3 organizations which say the only safe sleep is for a baby to
4 sleep flat on a horizontal surface, on its back, with nothing
5 else in the bed, no fluffy monkey ears around the face or
6 anything like that, because that's a suffocation hazard.

7 So basically our -- we have a series of requests that
8 say if you designed this for safe, for safe all-night sleep,
9 tell us what you did to determine that it was safe to sleep in
10 this thing.

11 And we have a series of objections, including it's
12 not relevant and it's not proportionate, you know, and we
13 should only be talking about one model, and then we have some
14 responses that include things like, well, we -- we're all very
15 highly educated here at Fisher-Price in health, and we go to
16 safety conventions and things like that.

17 That's not -- the problem is their -- again, their
18 30(b)(6) witnesses in other cases have basically said, we did
19 no clinical testing. We, we consulted exactly one doctor, who
20 was not a pediatrician, who was a -- who practiced medicine for
21 a couple of years and then became a professional expert in
22 cases like, you know, some guy had a pal in his car and was
23 injured and some product liability cases.

24 So if that's all they did, they just need to say it
25 instead of here's the 5,000 things that aren't responsive to

1 our question.

2 THE COURT: Okay.

3 MR. PHELAN: So let me just point out that -- I'm
4 trying -- I'm trying to narrowly tailor this so that we're not
5 just talking in abstract. Under the requests for production,
6 which are the last -- the last stack of documents are the
7 requests, the objections followed by the actual responses. The
8 requests for productions, if you look at the objections, this
9 is the page that says 1 of 21, the introductory objection is
10 what I've been talking about. They're trying to limit --

11 THE COURT: Right.

12 MR. PHELAN: -- everything to the BGB20 model.

13 So then with that in mind, I want to talk about
14 requests 10 through 12, which are essentially the, all
15 documents relied upon prior to first selling the Rock 'n Play
16 for the proposition that these sleepers were safe for all-night
17 sleep. It's -- but, you know, I think the objection should be
18 overruled. It's absolutely relevant to this case.

19 No. 10. And specific, if there are any, you know,
20 documents relied upon should be identified, labeled, and
21 categorized as required by Rule 34, not just a response of see
22 our multiple thousands of documents. It's in there somewhere.

23 THE COURT: Okay.

24 MR. PHELAN: Same, same thing with 11 and 12. It's
25 the same category.

1 Then, then request No. 13 is the one that deals with
2 the other incidents.

3 THE COURT: Right.

4 MR. PHELAN: We've talked about that. And then
5 Nos. 16, 17, and 23 cover the issue of relating to an infant
6 being able to push up into the sleeper, also highly relevant.
7 I think that objections should be overruled and there should be
8 fulsome responses. There is to one of them. It says, "None."

9 THE COURT: Right. That's in 16.

10 MR. PHELAN: But that -- if I may point out, that
11 answer is only accurate if the objection stands, because the,
12 the photograph I showed you of the experiment --

13 THE COURT: Right.

14 MR. PHELAN: -- happened after our incident, so
15 they're saying subject to the objection, there are none.

16 THE COURT: Okay.

17 MR. PHELAN: There are some. They just were after
18 our incident.

19 No. 18 is also a safety question, and it deals with
20 the strap, which they refer to as the crotch strap. And again,
21 if that's the only restraint and you're not putting a strap
22 over the child's shoulders, the child can scoot up in this
23 thing.

24 And the strap's not -- by the way, the strap's not
25 even affixed to the hard plastic exterior. It's looped through

1 the material. So it rides up.

2 We think we should be -- we should know whether there
3 was any safety or efficacy research or studies or testing with
4 respect to that strap.

5 And then just -- you know, just to point out how
6 little sense this global objection makes, we, we say in
7 requests No. 19 through 20, well, give us the testing you did
8 specific to the SnugaMonkey and the other animal face models,
9 and again that's objected to. I think those should be
10 overruled, and there should be specific, categorized, labeled
11 responses to that because not every model came out in the same
12 year. And maybe, you know, maybe they did some testing in 2013
13 that they didn't do in 1990. We should know that.

14 Finally, No. 21 is, is the one that covers the
15 recall.

16 THE COURT: Okay.

17 MR. PHELAN: And then I have -- I'm sorry to be
18 taking so long.

19 THE COURT: That's all right.

20 MR. PHELAN: I just have three interrogatories that
21 I'd like to discuss.

22 THE COURT: Okay.

23 MR. PHELAN: And that is the next set of documents,
24 starting with the objections. There -- you have the same
25 global objection to the interrogatories that we asked be

1 overruled in the introductory statement.

2 And then the next interrogatory I'd like to discuss
3 is No. 5, which is on page --

4 THE COURT: 5. I've got it.

5 MR. PHELAN: 5. And this essentially gets to the
6 issue of you designed it for all-night sleep. What, if
7 anything, did you do to determine if it was safe for all-night
8 sleep?

9 We ask that the objection be overruled, and, you
10 know, I've mentioned, I've mentioned the testimony by the
11 30(b)(6) people, but I can't articulate it any better than *The*
12 *Washington Post* did in May, May of this year. This is brief.
13 They said it was 2009, Fisher-Price's invention was an incline
14 sleeper. They named it the Rock 'n Play, held babies on their
15 back in a padded frame at a 30-degree angle like a recliner.
16 There was nothing else like it. Cribs and bassinets lie flat.
17 The difference was spelled out right on the box, baby can sleep
18 at a comfortable incline all night long, but Fisher-Price
19 developed its revolutionary product based on faulty beliefs
20 about infants' sleep, with no clinical research into whether it
21 was safe, and rather than seeking the advice of pediatricians,
22 consulted just a single doctor, a family physician from Texas
23 whose expertise had already been doubted by judges and who
24 would eventually lose his medical license.

25 In, in fact, the first time Fisher-Price hired a

1 pediatrician to evaluate the Rock 'n Play was eight years later
2 as part of the company's defense in a product liability
3 lawsuit.

4 So we're asking that the objection be overruled, and
5 if the answer is, we didn't do anything, then that should be
6 the answer. If -- instead, if you read the answer, it is a
7 litany of evasions that talk about things like I mentioned.

8 THE COURT: Right.

9 MR. PHELAN: We've gone to conventions. We have
10 people who are educated on our staff. You know, we've looked
11 at some standards.

12 There were no standards because this was the first
13 product of its kind when it came out. The standards did not
14 address the safety of sleeping at an incline. The only
15 standard that addressed inclined sleepers came out years later
16 and was written by Fisher-Price's Rule 30(b)(6) witness.

17 But at the time -- the question has to do with at the
18 time you developed the product and represented it to be safe
19 for all-night sleep, what did you -- what did you rely on for
20 that representation, and I don't think that is answered. We
21 ought to, we ought to, we ought to hear from them that they
22 didn't do clinical testing.

23 THE COURT: Okay. All right, thank you.

24 MR. PHELAN: So No. -- the next one is No. 6. We're
25 asking for the identity of the people on the product safety

1 committee. We've got the names of the committees given but no
2 people. We ask that the objection be overruled and that
3 everyone be identified who was on the committee that developed
4 this product.

5 And then No. 8 is one that I -- one of the reasons I
6 wanted the Court to hear from me, because we've had a
7 discussion about No. 8 out in the hall. The, the answer to
8 No. 8, asking for a description of, of all instances in which
9 they videotaped or photographed a baby in a Rock 'n Play, was
10 subject, of course, to the objection which we ask be overruled,
11 they will produce copies of all testing-related videotapes and
12 photographs in their possession after a reasonable search.

13 We've never received in the Overton case any
14 production of any such video or photograph. In the hall,
15 counsel advised me, well, the only ones we have are the ones
16 that were produced in previous cases, which we understand that
17 you already have, which is true if that -- if that's all they
18 have, and I would just ask that -- and I think we have an
19 agreement and don't require a ruling -- that they, they
20 supplement the response to say so.

21 THE COURT: Okay.

22 MR. PHELAN: Because the way this reads is there are
23 others that they're going to produce in the future.

24 THE COURT: All right, thank you.

25 MR. PHELAN: And I think we've worked that out.

1 THE COURT: Okay.

2 MR. PHELAN: So that's it.

3 THE COURT: Thank you.

4 MR. PHELAN: Thank you.

5 THE COURT: Do you have an additional argument as to
6 your opposition?

7 MS. COHEN: Thank you, Your Honor, yes. May it
8 please the Court. Good morning. Lori Cohen again on behalf of
9 the defendants, along with Mr. Fowler. I appreciate being
10 here. I'm here, obviously, on pro hac from Georgia, and, you
11 know, I always hate to be in the court meeting Your Honor for
12 the first time on a motion to compel. It's certainly not what
13 we want to be doing here today.

14 So I don't mean any disrespect to counsel. We've
15 actually -- it sounded like we've had a lot of disagreements.
16 We've actually had a very pleasant, I think, good working
17 relationship until this moment --

18 THE COURT: Okay.

19 MS. COHEN: -- you know, perhaps.

20 So I don't want the Court to think we've had some
21 kind of, you know, really uncooperative --

22 THE COURT: Well, you're at the end of discovery, and
23 this is the first time I've seen you, so I assume that that's
24 not the case.

25 MS. COHEN: Yes. So, so again, what I want to start

1 with, it's interesting sitting here today, and this is -- I
2 thought it was a very unusual argument. Again, I'm not trying
3 to cast aspersions on Mr. Phelan because I think I have a lot
4 of respect for him and also Ms. Hinson, but if you look at
5 plaintiffs' brief, and I know Your Honor did --

6 THE COURT: Yes.

7 MS. COHEN: -- it was a lot different from what was
8 being argued today.

9 So this brief was first of all, again, as Mr. Phelan
10 did today, an attempt to cast aspersions on my client about all
11 of the, you know, circumstances surrounding the recall of the
12 product, obviously, that's not related to specifically this
13 case. This case is a different situation, which I'll talk
14 about in a moment.

15 If you look at their motion to compel, I think the
16 first 11 pages are talking about things, as Mr. Phelan did,
17 just kind of throwing, you know, bad comments about our client
18 to the recall and the product, and when you get to the actual
19 argument part, it starts on page 13, I believe, there are three
20 pages of argument -- actually 14, 14 to 17 is the argument, and
21 then the last page is what they're seeking, and it's actually
22 three -- basically three asks, three requests of the Court
23 wholly different from what we heard today.

24 THE COURT: Well, I don't think it's wholly
25 different. I think it's an expansion certainly, but I don't

1 think it's wholly different.

2 MS. COHEN: So again, our opposition, as Your Honor
3 heard and probably read, with the declaration of Mr. Fowler
4 attached, I think we try to go through chronologically exactly
5 what we did in discovery, and we address in our briefing these
6 three topics. Now, there were a lot of expansion, I agree with
7 that term, certainly an expansion. All the -- the last part of
8 Mr. Phelan's argument about the different interrogatories,
9 requests for production, not part of this motion.

10 So there hasn't been a meet and confer on those
11 issues. We certainly can sit down with them if -- you know, as
12 we did in the hallway, but again, we focused on the three
13 categories of documents.

14 Also, I would add that plaintiffs in this entire
15 brief do not cite any statute, do not cite any law. We tried
16 in our opposition --

17 THE COURT: I already know what the law is. I do
18 discovery motions every single week.

19 MS. COHEN: Okay.

20 THE COURT: So I certainly don't need that explained
21 to me.

22 MS. COHEN: Okay.

23 THE COURT: Okay.

24 MS. COHEN: So anyway, again, we focus on those three
25 categories of documents.

1 Now, Mr. Phelan did talk when he stood up here about
2 again his package of information that he passed out.

3 THE COURT: Yes.

4 MS. COHEN: Much of this, Your Honor, does not relate
5 to the Overton case. There are articles in here, the pictures,
6 I think you know this is not the Overton child.

7 THE COURT: I know that.

8 MS. COHEN: These are things we're seeing for the
9 first time.

10 THE COURT: He explained that. Yes, I understand
11 that.

12 MS. COHEN: Letters from other counsel.

13 So again, this is not part of the record, not
14 something that we --

15 THE COURT: Look, all I've looked at from what he
16 handed me was the pictures in the beginning, the
17 interrogatory -- the objections to the interrogatories and
18 objections to requests for production of documents, and really
19 that's it. So I don't think that there's a whole lot here that
20 I've reviewed that will make any difference in terms of your
21 ability to argue this motion, so why don't we get to it.

22 MS. COHEN: Okay. Thank you, Your Honor.

23 So again, as we've said, I think, pretty clearly in
24 our opposition and with Mr. Fowler's declaration, we have gone
25 to great lengths in this case to meet our discovery

1 obligations. Now, Mr. Phelan talked about a 30(b)(6)
2 deposition. I think it was clear but I do want to make this
3 very clear on the record, there's been no deposition of our
4 corporate witnesses in this case so far nor a 30(b)(6), and
5 that's not because of us. They literally just asked for the
6 first time last week, and so we're working on scheduling them.

7 So comments about what 30(b)(6) witnesses had to say
8 in depositions are not in this case, and they're not -- no
9 comments were made about impossibility of standing up or
10 restraints. So there were a lot of comments by Mr. Phelan when
11 he stood up here about witnesses that haven't happened yet.
12 They were in other cases. Now, whether they will say something
13 similar is another story, but again, they just asked for
14 depositions. They'll be taken probably in January under our,
15 our discussion and our agreement.

16 THE COURT: Okay.

17 MS. COHEN: So again, that, I think, was, was related
18 to another case.

19 In this case, what we have from the records in terms
20 of restraints, as I think Mr. Phelan brought that up, is we
21 have reports from the detectives, we have reports from the
22 police, reports from the CPSC, saying that this child was not
23 restrained. So that will be part of the evidence that comes
24 forward. I just felt the need to explain that because it's
25 wholly different from what Mr. Phelan said in terms of the

1 restraint issue.

2 But putting that factual part aside, if you look,
3 Your Honor, at the sequence of discovery in this case, we did
4 negotiate initially a -- the, the joint agreement, which I have
5 here.

6 THE COURT: Yes.

7 MS. COHEN: And I think what's important in this --
8 and we again had a very good discussion, we've had good
9 dialogue and communication all long -- if you look at page 3 of
10 the joint report, what it says, and Mr. Phelan didn't read this
11 part, on paragraph 6, it says: The parties further agree that
12 new ESI searches and custodian records collections are not
13 necessary provided that defendants reproduce the *Goodrich* and
14 *Torres* production in this case.

15 THE COURT: Do you really think that they were
16 waiving their ability to get all documents since the *Goodrich*
17 and the other case, in that several-year time period?

18 MS. COHEN: Not at all.

19 THE COURT: Okay.

20 MS. COHEN: And, Your Honor, the, the *Goodrich* ones,
21 again, even though the event was 2014, the production was 2016.
22 So again, it's talking about 2014. Obviously, the production
23 covered up until 2016, but I'm not arguing that they waived
24 that at all. In fact, what I'm going to tell you and what I
25 think our brief told you and what I hope our declaration told

1 you is that we have, in fact, produced a significant amount of
2 documents.

3 And I think you have the numbers in our, in our
4 descriptions. We've had three productions. We did our
5 objections timely. We did our responses timely.

6 There's some questions about some of them, you know,
7 we certainly should meet and confer before Your Honor strikes
8 objections, because that was the first time I heard about those
9 numbers today when Mr. Phelan stood up. He never raised it
10 with us before. We're happy to look at those.

11 Our productions, the first one was October 17. The
12 second one was November 6. The third one was, was on
13 December 5. We've produced some over 2,000 documents, over
14 13,000 pages.

15 So while on the one hand it's not, you know, as much
16 as some cases, but it's certainly significant. It's certainly
17 what we agreed to. It's certainly beyond just reproducing the
18 *Goodrich* and *Torres*, Your Honor. That was our agreement, that
19 we would meet and confer and do that, and we did that.

20 So again, we -- if we look at the productions, each
21 time we've, we've made our productions, and they went beyond
22 the *Goodrich* and *Torres*, and we agreed to that.

23 So going to their specific categories, Your Honor,
24 which is the -- again, if you look at their briefing --

25 THE COURT: Yes.

1 MS. COHEN: -- and the conclusion page, so
2 specifically just to tell you where we stand on, on what was
3 in, in the motion, so first, all documents concerning or
4 regarding any and all pre- and post-market testing to determine
5 whether it was safe at night. We produced --

6 THE COURT: Which number was this again?

7 MS. COHEN: Yes. This is No. 1, Your Honor, on
8 page --

9 THE COURT: Okay.

10 MS. COHEN: Just using their lists, on page 18, their
11 conclusion of plaintiffs' motion to compel, which we obviously
12 responded to and what we focused on for today, all the testing
13 documents before and after, so our response to that is the
14 productions we made --

15 THE COURT: But, but here's the thing: When I look
16 at No. 18 -- this is the one you just said, correct?

17 MS. COHEN: Page 18, I'm sorry. Page 18 of the -- I,
18 I was going by the plaintiffs' --

19 THE COURT: Which request number are you talking
20 about?

21 MS. COHEN: Well, actually it was plaintiffs' motion
22 to compel.

23 THE COURT: I'm looking at plaintiffs' motion to
24 compel --

25 MS. COHEN: Oh.

1 THE COURT: -- and the interrogatories that were
2 attached to it.

3 MS. COHEN: Okay.

4 THE COURT: My question is which interrogatory or
5 which request for production are you talking about? Which
6 number?

7 MS. COHEN: Well, I'm really just looking at the
8 conclusion of their brief, their category.

9 THE COURT: Well, I'm looking at the actual
10 responses --

11 MS. COHEN: Okay.

12 THE COURT: -- because what I'm concerned about is
13 the objections that were made and that you've stood on when you
14 answered.

15 For instance, you said their request No. 18 was
16 documents concerning or relating to testing or the safety or
17 efficacy of the Rock 'n Play crotch step -- strap.

18 MS. COHEN: Yep.

19 THE COURT: You object on the basis of being
20 burdensome, blah, blah, blah. Then you say because it goes
21 back ten years involving every model, including models other
22 than the product, for instance, and you have other objections
23 that are similar to that.

24 And then when you answer, you rely on those
25 objections. You still say, "Subject to our objections."

1 So when I look at that, I have to agree with the
2 plaintiff that I really couldn't -- I wouldn't be able to tell
3 whether you are answering that completely with regard to all
4 models or generally and not just the model at issue in this
5 case.

6 MS. COHEN: And, Your Honor, I will say that we've
7 had, and I think they were attached to Mr. Fowler's
8 declaration, a number of letters back and forth,
9 communications, and I think in our opposition, we made clear
10 even though we asserted and initially asserted an objection
11 that we were going to focus on this model and we certainly have
12 that argument that we would want to reserve for trial for
13 admissibility, putting that aside, we did not restrict --

14 THE COURT: But how would anyone know that? Because
15 that's not what you said in your answers. That's the problem.

16 MS. COHEN: All right.

17 THE COURT: If you were going to waive that
18 objection, you could have said so and answered it completely,
19 but you didn't. You said -- in every one of your responses,
20 you've said, "Subject to and without waiving our objections."

21 MS. COHEN: Right. And I think in our letters that
22 we -- that are production letters, we made clear and we have
23 the sequence of them attached to Mr. Fowler's declaration,
24 we're happy to go back and revise the actual responses.

25 THE COURT: Okay.

1 MS. COHEN: That's not a problem, Your Honor. I
2 mean, the first time we heard that they wanted us to revise
3 those was today, so I don't mean to be disrespectful of the
4 Court or counsel, but we're happy to do that piece of it, but
5 what I was focusing on in the meet and confers and in their
6 motion to compel is the documents, because that's all they
7 asked for.

8 THE COURT: Okay.

9 MS. COHEN: So the first time I'm hearing that they
10 want the -- these revised is today.

11 THE COURT: Well, I think -- I gotta tell you, I
12 think it's part and parcel because their, their concern was
13 whether you were not disclosing all documents, other incidents,
14 and so forth and so on because of your restrictions in your
15 objections. So I think that it's part and parcel the same
16 thing.

17 MS. COHEN: I understand that, Your Honor.

18 THE COURT: Okay.

19 MS. COHEN: And if you look at our declaration,
20 though, in our attached letters, we try to make it clear, if
21 Mr. Phelan had said, hey, Lori or Mr. Fowler -- Ms. Cohen,
22 Mr. Fowler, can you also in addition to this letter, these are
23 the -- these are our PDs and the rogs that I have trouble
24 with -- can you go back and revise them, we would have done it,
25 but we didn't have that discussion. We had --

1 THE COURT: Then why are we arguing?

2 MS. COHEN: And we --

3 THE COURT: So you're fine with it. Why are we
4 arguing about it then? Let's move on.

5 MS. COHEN: Well, because the document part is what,
6 where we have, you know, I think it's important to have Your
7 Honor weigh in on, which is, which is again, just looking at
8 the categories that were again part of their motion, page 18,
9 one was asking us for all pre- and post-market testing.

10 THE COURT: Yes.

11 MS. COHEN: And our position there and what we said
12 in our briefing and what we told them is that we had produced
13 numerous testing documents. We produced everything in the
14 *Goodrich* and *Torres*, we reproduced those.

15 I heard today that there's a question about whether
16 they received the video again, and we're happy to reproduce it
17 in this case. I think they had that, but we're happy to
18 reproduce that.

19 But beyond that, where, where we are drawing the
20 line, if you will, again subject to Your Honor's, you know,
21 direction and ruling, is on ESI.

22 So again on the testing part, we thought we had an
23 agreement in the joint report, as in paragraph 6, that we would
24 basically produce testing documents from *Goodrich*, from *Torres*.
25 We would not redo ESI because that was our agreement.

1 THE COURT: What about testing beyond *Goodrich* time
2 period? I mean, what about testing from, what was that, 2014
3 to, to 2019 -- or '18, rather?

4 MS. COHEN: 2016, which is when we did the
5 production.

6 THE COURT: Okay.

7 MS. COHEN: Those have been produced. So that's what
8 we're saying. We've produced all the testing documents.

9 THE COURT: Well, what about from that period through
10 2000 -- through the recall?

11 MS. COHEN: We, we have produced all the testing
12 documents up until the, you know --

13 THE COURT: No, I don't know.

14 MS. COHEN: Up until, up until the recall. So -- and
15 if we have to --

16 THE COURT: Is that what you said?

17 MS. COHEN: I think that is what we said.

18 THE COURT: I don't think so.

19 MS. COHEN: Other than, other than electronic
20 documents related to testing, so actual testing documents, yes,
21 and we're happy to -- I think we've said that in our, in our
22 responsive brief, in our --

23 THE COURT: Why not ESI?

24 MS. COHEN: Not ESI.

25 THE COURT: Why not?

1 MS. COHEN: Because we had an agreement in this case
2 per --

3 THE COURT: Okay.

4 MS. COHEN: -- the joint report not to produce
5 ESI-related testing.

6 THE COURT: All right. Let's go ahead.

7 MS. COHEN: So that's, that's the one piece of it
8 that I thought was important to clarify.

9 THE COURT: Okay.

10 MS. COHEN: Other than that, yes, we've produced
11 numerous testing documents. And so that's our -- that's what
12 we've done on that point.

13 THE COURT: Okay.

14 MS. COHEN: On the recall-related documents, really
15 again the same position. So we negotiated the joint discovery
16 plan. We agreed that we would do our best to produce recall
17 documents that the parties would negotiate and work in good
18 faith was the language, that we would, again, not redo ESI,
19 that we would produce what we had non-ESI format, and that's
20 what we've done.

21 THE COURT: Okay.

22 MS. COHEN: So that again is, is where we fall on
23 that, Your Honor, that we are not redoing the ESI because that
24 was our agreement under the joint discovery report, but that we
25 did produce them in December 5 production, production 3 of our

1 productions, recall documents.

2 THE COURT: Okay.

3 MS. COHEN: So we think we've done that other than,
4 than opening up ESI.

5 THE COURT: All right, thank you.

6 MS. COHEN: And then on the -- then, I think, the
7 last category, which I think is, is the one that I thought we
8 were really in most debate about, again, on plaintiffs' motion,
9 items 1 and item 3, we believe we have done that other than
10 ESI.

11 On No. 2, which is the incidents, we had a lot of
12 discussion about that, Your Honor, for all of the pre-Overton
13 death, December 2017, using that as the time frame, everything
14 prior to that we have produced in terms of incidents.

15 Now, Mr. Phelan and I discussed in the hallway there
16 may be some of these, like, non-death or
17 non-breathing-interruption cases. We'll go back and confirm
18 for him that again. If it's not -- if it's not a death but
19 it's a breathing interruption that we've produced that we
20 believe we have, we'll make that perfectly clear.

21 And our position, as I've said on our calls, in our
22 opposition brief, and I'll say today in the court, is that we
23 believe the pre-Overton death incidents, you know, again we
24 don't -- we're not, obviously, waiving or arguing admissibility
25 today because we think that's for another day, but we have

1 produced those for discovery purposes.

2 We believe that subsequent incident documents are not
3 discoverable and not admissible under the law we've cited in
4 our opposition.

5 THE COURT: Yes.

6 MS. COHEN: And we -- and that's why we drew the line
7 on that. Again, not to be intransigent, not to be difficult.
8 We wanted to be compliant and meet our discovery obligations,
9 and we thought that was a clean line. We would produce
10 everything pre-death and not produce post.

11 THE COURT: I understand.

12 MS. COHEN: We again think, think that none of it's
13 admissible ultimately other than if they meet the substantial
14 similarity test that I know Your Honor is certainly familiar
15 with, but that's where we kind of drew the line on that.

16 THE COURT: All right, thank you.

17 All right, I -- I'm not sure that the parties have a
18 real agreement as to what you negotiated, and I'm not sure that
19 it's very clear that it should be so limited as the defendants
20 suggest. As I said, the problem that I've got with the
21 interrogatory answers and the requests for production and the
22 document production responses is that every one of them says
23 subject to and without waiving the objections that you made
24 originally, and the objections that you made originally, I
25 believe, are not appropriate. I think that they're too

1 restrictive.

2 I understand and agree that post-death incidents may
3 or may not be admissible, probably are not going to be
4 admissible, but I believe that they should be discoverable in
5 this case, as in addition, the same, I believe, in discovery,
6 discovery purposes apply to testing the communications
7 regarding the recall and other testing that may have occurred
8 afterwards.

9 I'm going to strike the objections in the
10 interrogatories and requests for production of documents.
11 You're going to have to re-answer them not subject to the
12 objection so that he's got an answer that he knows whether
13 it's, it's complete or not.

14 I'm also going to order that you make more specific
15 reference to Bates numbers, especially with regard to, to
16 the -- well, that they have to be specific as to Bates numbers,
17 not, you know, general ranges but, but specific.

18 I am going to make it apply to, just for
19 clarification, all models and all near fatalities or other
20 injuries that are similar in nature in terms of possible
21 suffocation standing, rolling over, anything like that that
22 would relate to this.

23 I know he said that there was a mold issue. They're
24 not interested. I agree that that wouldn't be relevant. I
25 don't know that there's anything else out there that's so

1 irrelevant similarly, so you wouldn't have to do that, but
2 anything that's in any way, shape, or form similar to what
3 happened in this case is going to have to be produced.

4 And I, I gotta tell you that given all the litigation
5 over this, the number of deaths that have occurred, the number
6 of cases that you've had, and I know that there were two
7 several years ago, I have a hard time believing that you don't
8 already have this, frankly, and I bet you do. I bet you
9 already have it segregated.

10 So I'm going to order that you supplement your
11 responses by next Friday. If you need a few days more for ESI,
12 I'll ask you-all to talk about that and get that promptly done,
13 but I expect that you probably already have all of this stuff
14 ready.

15 So we're at the end of the discovery period, so
16 that's why I'm pushing you to get this done. Any questions?

17 MR. PHELAN: No, Your Honor. Oh, well, there's just
18 one. Some of the other incident evidence produced is produced
19 in this format. Let me give Ms. Cohen a copy.

20 And as you can see, it's heavily redacted.

21 THE COURT: Redacted? Why is it redacted?

22 MS. COHEN: It's personal health information. It's
23 confidential information but other --

24 THE COURT: Just make it -- no, we're just going to
25 make it subject to Attorneys' Eyes Only -- not Attorneys' Eyes

1 Only -- subject to a protective order. Attorneys, experts, I
2 don't know, I mean, that's -- it just wouldn't be disseminated
3 beyond what is necessary for this case, and so --

4 MS. COHEN: Your Honor, we still -- we still have
5 concerns about that in terms of putting patients' names in
6 there. I mean, I think that that --

7 THE COURT: You can delete the name.

8 MS. COHEN: Delete the names.

9 MR. PHELAN: Well, the infant's name, but what about
10 the parent, who is potential witness as to another incident?

11 THE COURT: Okay.

12 MS. COHEN: And, Your Honor, we felt strongly that we
13 should be able to redact the names and the identifying -- if
14 they think that it's so, so --

15 THE COURT: But you're not a health care provider, so
16 why do you need to redact it?

17 MS. COHEN: I think -- well, the other, the other
18 reasons is I think the plaintiff should have the burden of
19 looking at it, and if they believe it's substantially similar,
20 have that argument.

21 THE COURT: We're at the end of the discovery period.
22 We don't have time for that.

23 MS. COHEN: But --

24 THE COURT: Just go ahead and produce it. It's
25 subject to the protective order, so it's not going to be

1 disseminated further.

2 MS. COHEN: Well, we have concerns about, about
3 counsel contacting these witnesses potentially for this.

4 THE COURT: So he might. All right.

5 MS. COHEN: And I, I did have one other question,
6 Your Honor, if I may?

7 THE COURT: Yes, sure.

8 MS. COHEN: On the, on the striking of the
9 objections, those relate -- that relates to the specific ones
10 that counsel raised?

11 THE COURT: No, all of them, because I think that
12 they're all improper, and you've repeated them in every single
13 one practically. They're all stricken. It has to all be
14 re-answered.

15 MS. COHEN: Okay.

16 THE COURT: They need to have a fixed target.

17 All right, Court stands in recess.

18 MS. COHEN: Thank you, Your Honor.

19 (Which were all the proceedings
20 had at this time.)

21 CERTIFICATE OF THE TRANSCRIBER

22 I certify that the foregoing is a correct transcript from
23 the official electronic sound recording of the proceedings in
24 the above-entitled matter.

25 _____
/s/
Anneliese J. Thomson